Supreme Court, U.S.
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No. 94-2134

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GEORGE PETERSON,
Petitioner,
vs.
AMERICAN LIFE & HEALTH INSURANCE COMPANY, CREATIVE HEALTH PROGRAMS; PACIFIC SOUTHWEST ASSOCIATION OF SMALL EMPLOYER FIRMS,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SHERRIL NELL BABCOCK
Counsel of Record

GIANELLI & MORRIS

880 West First Street
Suite 215
Los Angeles, California 90012
(213) 620-7272

Attorneys for Petitioner
GEORGE PETERSON

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

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QUESTION PRESENTED

1. Does the Employee Retirement Income Security Act of 1974 confer federal court jurisdiction over an action for recovery of insurance benefits under a policy of insurance held solely by an owner/employer, and preempt his state law causes of action?

LIST OF PARTIES TO THE PROCEEDINGS

The parties to this proceedings are all listed in the caption of this case. The Petitioner, George Peterson, is an individual.

No appeal was taken from the dismissed claims against Mr. Richard Reynolds, and he is not a party to this proceeding, nor was he a party in the court below.

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

GEORGE PETERSON,
Petitioner,
vs.
AMERICAN LIFE & HEALTH INSURANCE COMPANY, CREATIVE HEALTH PROGRAMS; PACIFIC SOUTHWEST ASSOCIATION OF SMALL EMPLOYER FIRMS,
Respondents.

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Mr. George Peterson, respectfully requests and seeks certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

I.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 48 F.3d 404 (9th Cir. 1995), and is reprinted in Appendix A. The opinion of the District Court granting the insurer's summary judgment motion was not reported, but is also reprinted in Appendix C. The opinion of the District Court denying

remand of the action to California state court, and dismissing all state law claims, is reprinted in Appendix D.

II.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit denied petitioner's timely petition for rehearing and for rehearing *en banc* on April 6, 1995. (Appendix B.) Petitioner seeks review of this judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case requires the Court to analyze the preemptive scope of the Employee Retirement and Security Act of 1974 (hereinafter "ERISA"), 29 U.S.C. § 1001 *et seq.* as same applies to the owner/employer of a business providing insurance solely for himself, but which has covered an employee in the past. Pertinent portions of the statutes at issue are cited here, and the full text of each is printed in the appendix, as noted.

The pertinent portion of 29 U.S.C. § 1132 states that: "A civil action may be brought — (1) by a participant or beneficiary — . . ." (Appendix E.)

29 U.S.C. § 1002(7) defines "participant" as "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers

employees of such employer or member of such organization, or whose beneficiaries may be eligible to receive any such benefit." (Appendix F.)

29 U.S.C. § 1002(8) defines "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." (Appendix F.)

29 U.S.C. § 1103(c)(1) states that ". . . the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries. . . ." (Appendix G.)

29 C.F.R. § 2510.3-3(c)(2), which clarifies who is an "employee" under ERISA, provides: "A partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership." (Appendix H.)

IV.

STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction

This is the question at issue in this case. The U.S. District Court for the Central District of California and the U.S. Court of Appeals for the Ninth Circuit held that federal jurisdiction pursuant to ERISA existed because Mr. Peterson, a partner in an unincorporated business, was seeking benefits allegedly due him under an insurance policy paid for by his business, which had, at one time in the past, covered one employee in addition to Mr. Peterson.

B. Petitioner's Background and Factual Allegations

The insured is a partner of the business that paid for his insurance. At the time of the surgery for which he seeks benefits, no employee or other person associated with that business was covered under the American Life policy.

C. Procedural History

This action was originally filed in the Superior Court of the State of California, on February 13, 1991. The Complaint stated causes of action for Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing, Negligence, and Breach of Oral Contract, under California law relating to insurance contracts. The defendants were American Life & Health Insurance Company ("American Life"), Creative Health Programs, Pacific Southwest Association of Small Employer Firms ("PSA"), and Richard G. Reynolds. The insured did not appeal for the dismissal of the claims against defendant Reynolds, the sole defendant in the Breach of Oral Contract Claim.

The Complaint was served on Defendant Reynolds on February 27, 1991, and was removed to the United States District Court on March 28, 1991. The sole ground asserted in the Notice of Removal was that the District Court had original jurisdiction of the action under the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*

On April 2, 1991, Defendants moved to dismiss all claims in the Complaint on the grounds that same were preempted by the provisions of ERISA. On April 5,

1991, the insured filed a Motion to Remand the action to State Court on the grounds that as an owner/employer and the sole insured under the policy, no subject matter jurisdiction of the insured's claims could be found under ERISA. The District Court continued both motions to allow for discovery on the jurisdictional issues.

On October 7, 1991, the District Court denied the insured's motion to remand, finding that the American Life & Health Insurance policy was an employee welfare benefit plan, due to the fact that the insured's business paid the premiums for his policy. The District Court further found that although the insured was a partner in that business, and an owner/employer, his claims were preempted by ERISA due his status as a beneficiary under the American Life & Health Insurance plan. The District Court rested its decision on the decision of the U.S. Court of Appeals for the Ninth Circuit in *Harper v. American Chambers Life Ins. Co.*, 898 F.2d 1432 (9th Cir. 1990). The Court consequently granted defendants' Motion to Dismiss, with leave to amend. (Appendix D.)

The District Court elected to treat the case as one amenable to summary judgment. After hearing extensive oral argument by the parties, the District Court entered Summary Judgment for American Life on May 19, 1993. In doing so, the District Court confirmed its prior determination that Mr. Peterson's claim for benefits was governed by ERISA, and that all state law causes of action were dismissed. (Appendix C.)

Mr. Peterson timely appealed, and noted to the U.S. Court of Appeals for the Ninth Circuit that its decision in *Harper v. American Chambers Life Ins. Co.*, 898 F.2d 1432 (9th Cir. 1990) had been adopted by no other court, and was in conflict with every other U.S. Court of Appeals and a state court of last resort within its own territory that had decided the issue of whether an employer could recover benefits under an ERISA plan. The

U.S. Court of Appeals upheld its decision in *Harper* on February 15, 1995 (Appendix A), and issued an order declining to consider the matter *en banc* on April 6, 1995 (Appendix B).

REASONS FOR GRANTING THE WRIT

1.

THE NINTH CIRCUIT'S DECISIONS IN *HARPER* AND *PETERSON* ON THE ISSUE OF THE RIGHT OF AN OWNER/EMPLOYER TO SEEK ERISA BENEFITS AS A "BENEFICIARY" IRRECONCILABLY CONFLICTS WITH OPINIONS OF THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT AND THE COURT OF LAST RESORT FOR THE STATE OF NEVADA, AND HENCE, DESERVES THIS COURT'S ATTENTION PURSUANT TO U.S. SUPREME COURT RULE 10(a).

A. The Ninth Circuit's Decisions Directly Conflict With the Decision of the Sixth Circuit in *Fugarino* on the Same Issue.

In *Harper v. American Chambers Life Ins. Co.*, 898 F.2d 1432 (9th Cir. 1990) and *Peterson v. American Health & Life Ins. Co., et al.*, 48 F.3d 404 (9th Cir. 1995), the Ninth Circuit held that so long as a person was a beneficiary of an ERISA plan, it did not matter if that person was an independent contractor, owner, or employer. While such persons could not claim as "participants," their status as beneficiaries brought them into the fold.

In the Sixth Circuit, in *Fugarino v. Hartford Life and Accident Insurance Co.*, 969 F.2d 178 (6th Cir. 1992), *cert denied*, 113 S.Ct. 1401, 112 L.Ed.2d 774 (1993), the Court held that Mrs. Fugarino's state law claims were not preempted by ERISA, as she was the owner/ employer of the business purchasing health insurance for herself, her husband, and her employees, and "a fundamental requirement of ERISA is that 'the assets of a plan shall never inure to the benefit of any employer.' " (*Id.* at 185.) The Court found that (1) the insurance contract covering the Fugarinos was not an ERISA plan and (2) even if it was accepted to be part of an ERISA plan, the claims of Mrs. Fugarino, a nonemployee, were not preempted.

The Court reasoned that while an employer could never designate himself as a beneficiary in his employee's benefit plan, the employer still possessed common law contract rights with regard to his insurance contract.

Under the Ninth Circuit rule stated in *Harper v. American Chambers Life Ins. Co.*, 898 F.2d 1432 (9th Cir. 1990) and confirmed in *Peterson v. American Health & Life Ins. Co., et al.*, 48 F.3d 404 (9th Cir. 1995), dismissal of the Fugarino's state law claims was appropriate, as they were "beneficiaries" of an ERISA plan, along with other true employees, and ERISA provided their sole remedy.

Such a conflict between the Circuits is grounds for granting of this petition. *McElroy v. United States*, 455 U.S. 642, 643, 102 S.Ct. 1332, 1333, 71 L.Ed.2d 522 (1982), U.S. Supreme Court Rules, Rule 10(a.)

B. The Ninth Circuit's Decisions Directly Conflict With the Supreme Court of Nevada's Decision in *Turnbow*.

In *Turnbow v. Pacific Mutual Life Ins. Co.*, 104 Nev. 676 (1988), *cert. denied*, 490 U.S. 1102, 109 S.Ct. 2458, 104 L.Ed.2d 1012 (1989), Ms. Turnbow's insurance policy also covered an employee of her business. The insurance company moved to dismiss Ms. Turnbow's state law-based action on the grounds it was preempted by ERISA. The Supreme Court of Nevada declined, noting that as an owner/employer, Ms. Turnbow was not an employee and was therefore entitled to seek relief in state court. (*Id.* at 676.)

Such a conflict, especially between a Court of Appeals and a state court of last resort within that very Court's territory, is also an appropriate grounds for granting this petition. U.S. Supreme Court Rules, Rule 10(a); *Baldwin v. Alabama*, 472 U.S. 372, 374, 105 S.Ct. 2727, 2729, 86 L.Ed.2d 300 (1985).

C. The Conflict is Widening, and Will Not be Resolved Without This Court's Intervention.

The Ninth Circuit has had occasion to revisit *Harper v. American Chambers Life Ins. Co.*, 898 F.2d 1432 (9th Cir. 1990) and confirmed it in *Peterson v. American Health & Life Ins. Co. et al.*, 48 F.3d 404 (9th Cir. 1995), with full knowledge of the *Turnbow* and *Fugarino* decisions. This is despite the fact that *Harper* has never been cited with favor outside the Ninth Circuit. The Ninth Circuit's position on this issue is firm and unchangeable by the passage of time and the rejection of *Harper* by all other Courts.

Harper v. American Chambers Life Ins. Co., 898 F.2d 1432 (9th Cir. 1990) has also been expressly criticized by two U.S. District Courts, who chose instead to follow *Turnbow v. Pacific Mutual Life Ins. Co.*, 104 Nev. 676 (1988), *cert. denied*, 490 U.S. 1102, 109 S.Ct. 2458 and *Fugarino v. Hartford Life and Accident Insurance Co.*, 969 F.2d 178 (6th Cir. 1992).

In *Kelly v. Blue Cross & Blue Shield of Rhode Island*, 814 F.Supp. 220 (D. Rhode Island, 1993), a Court within the First Circuit held that the *Harper* interpretation of the term "beneficiary" "would undermine ERISA's purpose of insuring that benefits not inure to employers." (*Id.* at 230, nt. 14.) Instead, the Court relied on *Fugarino*, as well as the reasoning of other U.S. Courts of Appeals in *Kwatcher v. Massachusetts Service Employees Pension Fund*, 879 F.2d 957 (1st Cir. 1989); *Meredith v. Time Ins. Co.*, 980 F.2d 352 (5th Cir. 1993); *Giardono v. Jones*, 867 F.2d 409 (7th Cir. 1989); and *Peckham v. Board of Trustees*, 653 F.2d 424 (10th Cir. 1981). (*Id.* at 227.) Each of those cases also held that the claims of an owner/employer are outside the scope of ERISA. The *Kelly* court also expressly adopted *Turnbow v. Pacific Mutual Life Ins. Co.*, 104 Nev. 676 (1988), *cert. denied*, 490 U.S. 1102, 109 S.Ct. 2458, and held that an owner/employer held nothing more and nothing less than state law causes of action where his or her insurance was at issue, despite the fact that employees were also covered under the policy. (*Id.* at 230.)

In *Madden v. Country Life Insurance*, 835 F.Supp. 1081 (N.D. Ill. 1993), a Court within the Seventh Circuit found that " . . . Harper strains credulity . . ." and expressly relied on the extensive analysis and cases found in *Kelly*. (*Id.* at 1086.) This Court too held that the owner/employer would be free to seek state law remedies available (if any) for the insurer's alleged breach of the insurance contract with him, with

knowledge of the fact that the contract also covered employees.

In *Brech v. Prudential Insurance Company of America*, 845 F.Supp. 829 (M.D. Ala. 1993), a Court within the Eleventh Circuit also accepted *Fugarino* and expressly adopted the holding of *Kelly* in determining that the insurance covering an owner/employer was not part of an ERISA plan, even though other employees were also covered under that same insurance contract.

The passage of six years since this Court denied the petition for certiorari in *Turnbow v. Pacific Mutual Life Ins. Co.*, 104 Nev. 676 (1988), *cert. denied*, 490 U.S. 1102, 109 S.Ct. 2458 (1989) have not served to bring about a consensus between the Circuits, or the Circuits and state courts of last resort, on the issue at hand. The Ninth Circuit has made clear that its opinion in *Harper* will stand, while an ever widening group of courts have made clear that they will continue to reject *Harper* just as strongly.

2.

FEDERAL JURISDICTION AND ERISA PREEMPTION ARE ISSUES UPON WHICH NATIONAL UNIFORMITY IS NECESSARY AND WOEFULLY LACKING

As noted above, the Ninth and Sixth Circuits are diametrically opposed on the subject of ERISA preemption of an owner/employer's claims under an insurance contract. The Ninth Circuit and the Supreme Court of Nevada (which is within the Ninth Circuit's territory) are also irreconcilably conflicted on the subject of federal jurisdiction in such circumstances. Lower courts are considering the issue, and those which have, have also rejected the Ninth Circuit's view. Such a widespread,

continuing conflict is indicative of the importance of the issue at hand, and the appropriateness of resolution by this Court. *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 646, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981).

This is especially true where there is a question of federal jurisdiction which is the subject of the conflict between U.S. Courts of Appeals (*Bruner v. U.S.*, 343 U.S. 112, 114, 72 S.Ct. 581, 583, 96 L.Ed. 786 (1952)) or between a Court of Appeals and a state court of last resort. *Barker v. Kansas*, 503 U.S. 594, 597, 112 S.Ct. 1619, 118 L.Ed.2d 243, 249 (1992).

The need for national uniformity in determination of ERISA matters is recognized by this Court. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142, 111 S.Ct. 478, 112 L.Ed.2d 474, 486 (1990); *Shaw v. Delta Air Lines*, 463 U.S. 85, 99, 103 S.Ct. 2890, 2901, 77 L.Ed.2d 490 (1983). It is clear from the position of the Ninth Circuit, and the increasing attack on that position, that such uniformity will be established with regard to the ERISA claimant status of an owner/employer only when this Court provides guidance on this issue.

3.

THE NINTH CIRCUIT'S DECISION IMPLIEDLY CONFLICTS WITH THIS COURT'S DECISION IN *DARDEN*

In *National Mutual Ins. Co. v. Darden*, 503 U.S. 818, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992), this court held that employees, not independent contractors and not agents, may bring ERISA claims. This case resolved a long standing area of confusion with regard to the persons entitled to bring an action for benefits under ERISA.

There, this Court reversed and remanded a granting of summary judgment in favor of the insurer where an arguably independent contractor had brought suit in federal court for recovery of ERISA benefits. An independent contractor was held to have no standing to sue as an ERISA plaintiff, even though he was a designated beneficiary. Remand was made to allow a factual determination of whether or not Mr. Darden was an independent contractor or an employee, under common law agency rules.

Under the Ninth Circuit's reasoning in *Harper v. American Chambers Life Ins. Co.*, 898 F.2d 1432 (9th Cir. 1990), a determination of Mr. Darden's status would hardly suffice to determine if he could make a claim for ERISA benefits. Instead, it would have to be proven that each and every person receiving benefits under the same plan as Mr. Darden was also an independent contractor. If there was one single employee covered, at any time since the plan's inception, *all* persons would be covered as ERISA "beneficiaries," whether employees or those claiming under them, or independent contractors. The factual questions and discovery needed to resolve same would be immense.

It is true that this Court did not consider whether Mr. Darden's beneficiary status alone would render him able to collect benefits. However, the wild result of such consideration is evident. The mere fact that there might be an employee somewhere at sometime who also was a participant in an ERISA plan is insufficient to provide claimant status to one who is not and has never been an employee and is not and has never been designated by an employee as his or her beneficiary, according to every court that has decided the issue with one exception — the Ninth Circuit.

4.

CONCLUSION

For the reasons stated herein, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeal for the Ninth Circuit.

DATED: June 27, 1995.

Respectfully submitted,

SHERRIL NELL BABCOCK
Counsel of Record

GIANELLI & MORRIS

Attorneys for Petitioner
GEORGE PETERSON